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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 315

KARL F. VOEHL, PETITIONER,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To this Honorable Court:

The petition of Karl F. Voehl having been granted a severance from his co-defendant in the Court of Appeals of the District of Columbia, Robert J. Hoage, Deputy Commissioner for the District of Columbia, United States Employees' Compensation Commission, appears individually and separately and by his petition respectfully shows:

Statement of the Case.

This suit arises under the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 14, 1927 (U. S. C. Sup. II, Title 33, Chap. 18), made applicable to the District of Columbia by the Act of May 17, 1928 (Pub. 419, 70th Congress), in the following manner:

Karl F. Voehl, the petitioner herein, while in the employ of the National Electrical Supply Company of Washington, District of Columbia, on Sunday, April 6, 1930, about 8:30 a. m. sustained injuries resulting in permanent total disability to him, by reason of an automobile accident which occurred while he was en route from his home to his employer's place of business located at 1330 New York Avenue, Northwest, Washington, District of Columbia. By reason of the exigencies of his employment it was necessary for him to proceed to the employer's premises to remove an unusual accumulation of empty refrigerator crates and other débris in order to comply with the local fire regulations and to have the premises clean and in order for a usual inspection by the employer the following day. The employee's duties related to the storage, shipping and maintenance of the employer's electric refrigerator business. Mr. Voehl had duties to perform outside of his regular working hours which were from 7.30 a. m. to 5:30 p. m. during week days. These duties consisted of, first, operating a refrigerator service to customers of his employer at any hour of the day and every day of the week, whenever so required, and a telephone was installed in his home for this purpose, and secondly, to work at his employer's place

of business at any time he deemed it necessary in his supervisory capacity, and wished to carry out or perform something for his employer, whether it be on week days before or after his regular working hours, or on Sundays.

The employee received pay from his employer for overtime service at the rate of 75 cents per hour, and mileage for the use of his own automobile at the rate of 5 cents per mile, the additional pay and mileage being calculated *from the time the employee left his home until his return thereto.*

On the day of the accident the employee, accompanied by one Hugh L. Finnegan, proceeded over the customary route to the warehouse of the employer for the purpose stated. Mr. Finnegan, who had accompanied Mr. Voehl, had anticipated assisting Mr. Voehl in removing from the employer's premises a truck load of ashes in cans which were too heavy for one person to lift. The ashes were to be used by Mr. Voehl, for his personal needs in filling in depressions in the roadway in front of his residence. The primary and major purpose of the trip, however, was to clean the warehouse and to remove the refuse. The removal of the ashes was a secondary matter which was to be accomplished after work in the warehouse had been completed.

The employee subsequent to his injury filed claim for compensation under the above cited statute on October 30, 1930, and his claim was controverted by the insurance carrier for the employer, who based its defense upon the ground that the injury did not arise out of and in the course of his employment. A hearing was

held on December 11, 1930, before the deputy commissioner, who by compensation order dated January 8, 1931, awarded compensation to Mr. Voehl for temporary total disability. On February 5, 1931, the insurance carrier applied for a statutory review of the compensation order to the Supreme Court of the District of Columbia under the provisions of section 21 (*b*) of the Longshoremen's and Harbor Workers' Compensation Act as made applicable to the District of Columbia, which limits the court to a review of a compensation order to ascertain whether it is "not in accordance with law."

The Supreme Court of the District of Columbia by decree filed April 14, 1931, affirmed the compensation order of the deputy commissioner and the carrier then appealed to the Court of Appeals of the District of Columbia. That court entered its judgment on May 9, 1932, reversing the lower court and setting aside the said compensation order.

Applications to both the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia to stay compensation payments during the proceedings were denied by both courts.

It is from the final judgment of the Court of Appeals of the District of Columbia in reversing the decision of the Supreme Court of the District of Columbia that this application is made.

Questions Presented.

The controlling question in this case is whether the Court of Appeals of the District of Columbia in view of the decision of the Supreme Court of the United

States in the cases of *Crowell, Deputy Commissioner,* v. *Benson,* 285 U. S. 22, 52 S. C. R. 285, and *L'Hote* v. *Crowell, Deputy Commissioner,* 286 U. S. 528, 52 S. C. R. 499, erred in refusing to give conclusive and final effect to the findings of fact of the deputy commissioner as contained in the compensation order of January 8, 1931, in the statutory review limiting the court upon review to the sole inquiry whether the compensation order was *"not in accordance with law"*; or in other words, whether that court erred in delving into the evidence to reweigh the facts presented before the deputy commissioner, in face of substantial evidence in support of the findings of fact contained in the compensation order.

Reasons for Granting Writ.

1. This Honorable Court in the case of *Benson* v. *Crowell, Deputy Commissioner,* 285 U. S. 22, 52 S. C. R. 285, has stated the law in statutory reviews of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act that the findings of fact of a deputy commissioner in cases not involving constitutional rights (not here involved), "the Act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, *shall be final"* (italics supplied). This rule of finality has been reaffirmed by this Honorable Court in the recent case of *L'Hote* v. *Crowell, Deputy Commissioner,* 286 U. S. 528, 52 S. C. R. 499. The petitioner desires the same application of the law in his case as this Honorable Court

saw fit to apply in the *L'Hote* v. *Crowell* case, since the question is identical.

2. As shown in the attached brief the Court of Appeals of the District of Columbia, reweighed the evidence before the deputy commissioner, arriving at a conclusion diametrically opposite to that reached by the deputy commissioner in face of substantial evidence in support of the findings of fact of the deputy commissioner and contrary to the rule expressed by this Honorable Court in the cases cited.

3. That the conclusion on the facts as reached by the court below is not supported by the evidence in the record.

WHEREFORE, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered 5435 and entitled on its docket "Indemnity Insurance Company of North America, a Corporation, *vs.* Robert J. Hoage, Deputy Commissioner for the District of Columbia, United States Employees' Compensation Commission, and Karl F. Voehl, claimant, intervening defendant," and that the said judgment of the Court of Appeals of the District of Columbia may be reversed, and for such other and further relief as to the Court may seem meet and proper.

ISRAEL J. MENDELSON,
Counsel for Petitioner.

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INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction of This Court.

The jurisdiction of this Honorable Court to issue the writ prayed for herein arises and is conferred by:

1. Sec. 240-A of the Judicial Code as amended by the Act of Feb. 13, 1925, Ch. 229, sec. 1, 43 Stat. 938; U. S. Code, Title 28, sec. 347-*a*.

2. Action of the Court of Appeals of the District of Columbia in reweighing the evidence surrounding the time, place, and circumstances of the case and substituted its judgment for that of the deputy commissioner.

3. The decision of the Court of Appeals of the District of Columbia in conflict with a decision of this Honorable Court in Crowell, *Deputy Commissioner* v. *Benson,* 285 U. S. 22; 52 S. C. R. 285.

Statement of the Case.

A statement of this case is incorporated in the petition for writ of certiorari, under a similar heading.

Questions of Law Involved.

Did the Court of Appeals of the District of Columbia err in delving into the evidence to reweigh the facts presented before the deputy commissioner and to draw an inference therefrom contrary to that drawn by the deputy commissioner in face of substantial evidence in support of the findings of fact contained in the compensation order.

Specifications of Error.

1. The court below erred in reweighing the evidence taken at the compensation hearing before Robert J. Hoage, deputy commissioner, on the question whether the employee's injury "arose out of and in the course of the employment" and thereby arriving at a conclusion upon the facts in the case diametrically opposite to that reached by the deputy commissioner in his compensation order of January 8, 1931, where the deputy commissioner's findings of fact therein are supported by substantial evidence.

2. The Court of Appeals of the District of Columbia erred in refusing to follow the rule of law in such

cases which had been laid down by this Honorable Court in the case of *Crowell, Deputy Commissioner,* v. *Benson,* 285 U. S. 22; 52 S. C. R. 285, and following with summary judgment by this Honorable Court in the case of *L'Hote* v. *Crowell,* 286 U. S. 528; 52 S. C. R. 499.

Argument.

1. The Court of Appeals of the District of Columbia in its opinion in the case at bar stated that "the sole question before the court, therefore, is whether or not Voehl's injury arose out of and in the course of his employment" (R. 71).

To answer this question was to consider only the facts involved rather than to delve into delicate and fine points of law. The court in its opinion, after citing a number of cases in support of the decision, nullified their value and applicability to our present case by saying "Another exception would arise where Voehl outside of his regular hours was called upon as service manager to take care of a service call for a customer" (R. 72). The court thereby ruled, in accordance with the weight of authority and the trend of present-day thought, that even though the automobile vehicle belonged to the employee and even though on the public highway away from his employer's place of business, yet if he were on a "service call" for his employer, that situation would be another exception to the general rule and therefore be covered by the Compensation Act.

The Court while taking into consideration and putting full faith and credence in the testimony just re-

ferred to as part of the opinion, wholly disregards all the other evidence adduced at the same hearing and coming from the lips of the same witnesses, all of whom were produced on behalf of the claimant.

Digressing sufficiently to refer to some of the more salient facts pertinent to the issue herein, as disclosed by the record we find,

On pages 49-50 Mr. Voehl's statement as follows:

> "I took care of the building in accordance with the general order I had from Mr. McCrea, the general manager of the refrigeration department, that trash must not be allowed to accumulate. It was in carrying out this order that I governed my actions. The manager would inspect the warehouse every Monday morning in order to see that it was free of all trash. I naturally did my utmost to have the building clean for inspection. It was unusually busy at the building at the time I sustained my accident as we had to handle about 20 to 30 refrigerators per day. This of course caused trash to accumulate faster, making it necessary for me to come down to the building the Sunday of the accident."

Mr. Voehl's immediate superior, Mr. McCrea, in answer to a number of questions, said:

> "Mr. Voehl had charge, first of all, of the maintenance and operation of the warehouse, and, second, he was charged with seeing that service on refrigerators in operation in customers' homes, etc., was maintained. We called it 'Head of the products' division' " (R. 21).
>
> "Mr. Voehl supervised the unloading of the refrigeration units, refrigerators, placing them

in a warehouse, unpacking, examination before delivery, delivery, and installation in customers' homes" (R. 22).

"* * * If there was anything that needed to be done we could absolutely rely that he would do it and, as far as specific or detailed instructions go, it is my own policy not to give men specific instructions but to let the men do the job and I look for the results more than what we actually tell them to do" (R. 24).

2. Was the main object and primary reason for Mr. Voehl's trip to clean up and put the warehouse in order and not to obtain a load of ashes?

The deputy commissioner answered this supplemental question in the affirmative, thereby ordering an award of compensation. The answer to this question was arrived at after a hearing held in regular form before him, after having had an opportunity to observe, hear, and examine the various witnesses appearing before him, and after the claimant and insurance carrier introduced into the hearing all the testimony they cared or possibly could.

The Court of Appeals in its answer, after reweighing the evidence presented before the deputy commissioner, says "The evidence clearly established, we think, that the purpose of the trip on the Sunday morning of the accident was to procure a load of ashes for Voehl's personal use, and that if in fact he intended to remove some trash, this was merely incidental to the general purpose for which the trip was made" (R. 72).

The court continued and in the last paragraph of its opinion states:

> "To an employee injured as was Voehl in this case there is strong inducement to claim that he was on his way to perform some service incidental to his employment, but the claim advanced is in fact totally foreign to the motive which prompted the trip" (R. 73).

It is respectfully urged that there is nothing whatever in the record in this case (nor has the insurance carrier urged the matter) which demonstrates bad faith on the part of the petitioner Voehl. There is not a suggestion in the record that this was anything other than a *bona fide* claim. Mr. Voehl was very frank in his statement as to the purpose of the trip in that he did refer to his intentions to perform a personal errand after he had completed his duties for his employer. His employer did not question his integrity but specifically states:

> "I never questioned Voehl's overtime one bit. I have checked it enough to know that he was honest in his statements and if he put in an overtime charge for five hours or six hours or three hours that week, I am certain it was correct" (R. 24).

It is submitted, therefore, that the record contains competent and substantial evidence that Mr. Voehl was on an errand for his employer when injured and stands undisputed by the insurance carrier, and certainly sufficient to justify the inference drawn by the deputy commissioner; that where any evidence ap-

pears to support a finding of fact, under the law, the conclusions of the deputy commissioner are to be regarded *final* and *conclusive.*

3. With respect to the finality of the deputy commissioner's findings of fact, the Court's attention is respectfully directed to the case of *Crowell, Deputy Commissioner,* v. *Benson,* 285 U. S. 22, 52 S. C. R. 285, which specifically recognizes the finality of fact findings of a deputy commissioner where supported by evidence. This case passes on the very act under consideration in the present case. This Honorable Court (passing upon the Longshoremen's Act as it is applied to the admiralty and maritime jurisdiction of the United States) calls attention to the finality of fact findings of a deputy commissioner in all cases excepting those involved "jurisdictional" or "constitutional" rights (not here urged or involved) in the following language:

> "Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the Act the findings of the deputy commissioner, supported by evidence and within the scope of his authority, *shall be final.*" (Italics supplied.)

This rule of finality has been reaffirmed by this Honorable Court in the recent case of *L'Hote* v. *Crowell, Deputy Commissioner,* 286 U. S. 528, 52 S. C. R. 499. It is the desire of the petitioner that the

same application of the law be made in his case as in the *L'Hote* v. *Crowell case* since the questions are identical.

Conclusion.

This Honorable Court has already passed upon the question here involved, namely, the finality of the findings of fact of a deputy commissioner in a compensation case where supported by evidence, once with considerable discussion in the case of *Crowell, Deputy Commissioner* v. *Benson,* 285 U. S. 22, 52 S. C. R. 285, and again in a summary manner in the case of *L'Hote* v. *Crowell, Deputy Commissioner,* 286 U. S. 528, 52 S. C. R. 499.

The Court of Appeals of the District of Columbia in the present case has made independent inquiry into the facts surrounding the time, place and circumstances of Mr. Voehl's accident and injury and has arrived at a conclusion from these facts that the injury did not "arise out of and in the course of his employment." The deputy commissioner before whom the case was heard found an injury "arising out of and in the course of his employment" and his findings are supported by substantial evidence.

The conclusion which is necessarily reached is that the Court of Appeals erred in reweighing the evidence in this case. The evidence in this case does not even support the inference drawn by the Court in its conclusions upon the question whether the injury arose out of and in the course of the employment.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its

supervisory powers in order that a rule of law heretofore expressed by this Honorable Court may not be digressed from by a lower court and that to such an end a writ of certiorari should be granted and this Honorable Court should review the decision of the Court of Appeals of the District of Columbia and finally reverse it.

Respectfully submitted,

ISRAEL J. MENDELSON,

Counsel for Petitioner.

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